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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS MORENO, Defendant and Appellant.	F074533 (Fresno Super. Ct. No. F13903993) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Luis Anthony Moreno had five prior convictions for driving under the influence and had been admonished that he could be charged with murder if he killed someone as a result of driving under the influence. Despite these warnings, he was driving with a blood-alcohol level of 0.32 percent, four times the legal limit, and crossed over the center line and crashed into a Toyota that had been lawful traveling in the opposite traffic lane. The driver of the Toyota, Yee Her, was seriously injured and his wife and passenger, Blia Vang, was killed.

Defendant was charged and convicted of the second degree murder of Ms. Vang based on *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*), where the court held that a homicide caused by a drunk driver may be prosecuted as second degree murder based on implied malice when "the facts demonstrate a subjective awareness of the risk created, ..." (*Id.* at p. 298.)

On appeal, defendant raises numerous arguments in support of his contention that the court erroneously denied his motions to instruct the jury on "grossly negligent" involuntary manslaughter as a lesser included offense of second degree murder. Defendant asserts the court's failure to so instruct violated his constitutional rights to due process and a fair trial.

As we will explain, however, statutory and decisional law provide that both gross vehicular manslaughter while intoxicated, and involuntary manslaughter, are not lesser included offenses of second degree murder based on driving while intoxicated under the facts of this case. The court properly declined to instruct on any lesser included offenses and we will affirm.

FACTS

Around 7:00 p.m. on May 5, 2013, Yee Her was driving his wife, Blia Vang, on southbound Friant Road in their gray/silver Toyota Corolla. They had spent the day at Table Mountain Casino and were heading home.

Mr. Her testified another vehicle, later identified as defendant's black truck, crossed into his lane and crashed into his car. It happened so fast that he did not have time to swerve or brake. After the collision, Mr. Her repeatedly tried to shake his wife awake, but she did not move or respond. Mr. Her passed out and did not regain consciousness until he was at the hospital.

Mr. Her's Toyota and defendant's black GMC truck had collided on Friant Road near the south entrance to Lost Lake Recreation area, about five miles south of Table Mountain Casino.

There were other witnesses to the collision. Mary Juarez had also left Table Mountain casino and was driving on southbound Friant Road that night. She saw a truck driving in the northbound lane of Friant Road, toward the casino. The truck crossed into her lane and was coming towards her, and she was scared it was going to hit her. Juarez swerved to the right to avoid the truck. The truck missed Juarez, and she heard a bang. She turned around and realized the truck hit the vehicle that had been traveling behind her, which was Mr. Her's Toyota.

Brawlio Belmontez, Jr. was also driving on southbound Friant Road with his friend, Justin Cruz. Belmontez saw the headlights of a truck in front of him. The truck was in the northbound lane and traveling towards the casino. Cruz saw the truck make a sudden and sharp westbound turn. The truck veered across the center line into the southbound lane and collided with the Toyota that had been traveling in front of Belmontez.

Belmontez and Cruz testified that as the truck crossed into the southbound lane and turned west, the truck's passenger side hit the front of the Toyota, and the truck completely spun around.

Belmontez and Cruz stopped and tried to help the occupants of the Toyota. Mr. Her was in the driver's seat, and he was making noise. Ms. Vang was in the front passenger seat and she was silent.

Cruz went to the truck and found defendant sitting in the driver's seat. The truck's engine was still running. Cruz testified defendant smelled "profusely like alcohol. It was just overwhelming." Defendant asked Cruz, "[C]an you help me out, bro[?]" Cruz told him to stay where he was.

Mary Juarez also stopped to help the injured parties. She went to the truck and found defendant sitting in the driver's seat. Juarez intended to tell him that he had just missed colliding with her. Juarez testified defendant seemed to be "passed out."

The victims

Ms. Vang was pronounced dead at the scene. She was still buckled into the front passenger seat of the Toyota. She had suffered a fractured skull, internal bleeding in the brain, broken ribs, abdominal bleeding, and intestinal lacerations.

Mr. Her was seriously injured, but he survived. He was transported to the hospital and required surgery for lacerated intestines.

Defendant's statements at the scene

Around 8:30 p.m., California Highway Patrol (CHP) Officer Yetter responded to the scene of the collision. Yetter approached the black truck and found defendant, the sole occupant, was still in the driver's seat.

Officer Yetter testified defendant's "eyes were very red, watery, bloodshot," and he smelled the "distinct odor of an alcoholic beverage" from him.

Officer Yetter spoke to defendant at the scene, and the conversation was recorded and played for the jury. Defendant told Yetter that he was going to the casino. Yetter asked for his identification and whether anyone else was in the truck. Defendant said he was the only person, and that he did not have a valid driver's license because it had been suspended.

In response to Officer Yetter's questions, defendant said nothing was wrong with his truck prior to the collision and everything worked fine. Defendant again said he was

going to the casino and traveling about 50 miles per hour. He lost control and blacked out; he did not know what happened.

Defendant asked Officer Yetter if he hurt someone because it would be on his conscience if that happened. Yetter did not answer, but again asked defendant where he was going. Defendant said he was going to the casino, he was about two miles away, he lost control, and blacked out.

Officer Yetter testified that defendant's speech was delayed and slurred as he responded to his questions. Yetter asked defendant what he had to drink. Defendant said he had alcohol and Tecate beer. He said that he started drinking around 3:00 p.m. and stopped around 6:00 p.m. Yetter asked defendant if he felt intoxicated. Defendant said he was "coherent" and knew what was going on, but "of course I'm buzzed." There were no alcoholic beverage containers in the truck.

When defendant got out of the truck, he was not able to stand, and the paramedics placed him on a gurney. Since defendant was not able to stand, Officer Yetter was only able to perform one field sobriety test, the horizontal gaze nystagmus test. Defendant had "indicators of impairment" of "a high blood alcohol level."

Defendant refused to cooperate with a preliminary alcohol screening breath test. He asked Officer Yetter if he was going to be arrested. Yetter replied, "Yeah, unfortunately." Defendant asked the reason for his arrest. Yetter said it was for "driving under the influence for right now." Defendant was transported to the hospital.[1]

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[1] Prior to trial, the court conducted a hearing pursuant to Evidence Code section 402 based on defendant's arguments that his statements to Officer Yetter at the collision scene were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). At that hearing, Officer Yetter testified he did not advise defendant of the *Miranda* warnings when he initially talked to him at the collision scene. At the end of that conversation, Yetter arrested defendant and placed him in handcuffs that were attached to the ambulance gurney.

Officer Yetter's opinion about the collision

Officer Yetter testified the Toyota had major frontend damage, and the truck had major damage on the passenger side. There was a very large intrusion on the truck's passenger side, and a gap where the truck's cab and frame had separated from the bed. There was a debris field around the two vehicles of shattered glass and pieces of metal and plastic. There were tire friction marks on the road "indicative of a gradual turn at higher speeds."

Officer Yetter testified to his opinion that the collision was caused by defendant's failure to control the truck and maintain it in the proper lane. As a result, defendant made an unsafe turning movement so that the truck swerved into the opposite lane and hit the Toyota. After his investigation, Yetter recommended that defendant be charged with murder.

Defendant's blood-alcohol level

About two hours after the collision, defendant's blood was drawn at the hospital. His blood-alcohol level was 0.36 percent, which was over four times the legal limit of 0.08 percent.

Defendant's subsequent statements

Officer Yetter testified that around 11:00 p.m. on May 6, 2013, the night after the collision, he went to the hospital and spoke with defendant again. The conversation was recorded, and it was played for the jury.[2]

The court denied defendant's motion to exclude and held that Officer Yetter was not required to advise defendant of the *Miranda* warnings when he initially spoke to him at the collision scene. Defendant has not challenged this ruling on appeal.

[2] Outside the jury's presence, the prosecutor stated that Officer Yetter advised defendant of the *Miranda* warnings prior to the conversation at the hospital, but the advisement was not recorded.

Defense counsel advised the court that he was not moving to exclude defendant's statements at the hospital. While the *Miranda* advisements had not been recorded, counsel stated that a second officer had been present at the hospital, who reported that

During the conversation, defendant admitted that he had several prior convictions for driving under the influence (DUI). He had a "wet and reckless" in 1985 and two arrests in 1990, after he was separated from his wife. He had another conviction in 2010.

> "[Officer Yetter]: Seems like with having all those DUI's it would be fairly aware of the dangers of it, I mean . . .
>
> "A: It's stupid, just plain stupid.
>
> "Q: But did you understand it's dangerous?
>
> "A. Yes."

Defendant said that on the night of the collision, he had argued with his wife, and he drank before and after the argument. He did not feel the full effects of drinking until he was in the truck. He thought about stopping the truck, and it "probably" crossed his mind that he could hurt someone while driving in that condition.

Defendant said he had previously completed an 18-month DUI course in the 1990s. He was ordered to attend another course after the DUI conviction in 2010, but he failed to do so and did not get his driving privileges reinstated. Defendant said he went on disability and could not afford to attend the course. Defendant said there had been several occasions in the past when he was drinking and driving and did not get caught.

> "[OFFICER YETTER]. Do you ever consider the possibility that you'd be in the spot you're in now where somebody ended up dying as a result of it?
>
> "A. You hear about it in the news and paper as well and here I'm on the other side. You know … [Unintelligible] just happened to somebody else.
>
> "Q. … Do you have anything else … you wanna [*sic*] noted [in my report] or any other statement or thing that I maybe haven't asked you that you wanted to say?
>
> "A. Just my stupidity.

Officer Yetter advised defendant of the *Miranda* warnings prior to the conversation and defendant was responsive to the questions.

"Q. You just felt it was stupid decision?

"A. Psh very…"

Futher investigation

CHP Officer Kolter, a member of the Multi-Disciplinary Accident Investigation Team, downloaded information from the airbag control module of defendant's truck. The data showed the status of defendant's truck from five seconds before the collision, counting down to the time of impact.

At the five-second mark before the collision, defendant's truck was traveling 64 miles per hour. The truck's speed rapidly reduced to 58 miles per hour at four seconds before the collision; 46 miles per hour at three seconds; 30 miles per hour at two seconds; and zero at impact. This indicated the brake was used in a significant fashion between three and four seconds before the collision. At two seconds before the collision, the brake switch was off, which indicated the driver's foot came off the brake.

CHP Officer Munoz inspected defendant's truck and determined there was nothing mechanically wrong with the major systems that would have affected its performance.

DEFENDANT'S PRIOR ALCOHOL-RELATED CONVICTIONS

The prosecution introduced evidence about defendant's driving history and his prior alcohol-related offenses. Jeff Dupras, an assistant district attorney, testified about the prior convictions based on certified court documents, and that defendant had two different driver's license numbers.

1985 DUI conviction

The prosecution introduced evidence that defendant had a prior DUI conviction in September 1985.

1988 DUI conviction

On August 10, 1988, defendant was cited by the Santa Cruz Police Department for driving under the influence, a seatbelt violation, an open container violation, not having

insurance, and excessive speed. Defendant was taken into custody. His blood-alcohol level was 0.09 percent; the legal level was 0.10 percent at the time.

Defendant subsequently entered a no-contest plea to a "wet and reckless" driving charge in violation of Vehicle Code section 23103.5 and was placed on misdemeanor probation because of a prior conviction, on condition of serving 20 days in jail. Such a conviction constituted an alcohol-related driving offense.

March 1992 DUI conviction

Officer Goodwin of the Santa Cruz Police Department testified at this trial that on the night of March 22, 1992, he responded to a crash that involved two intoxicated drivers: defendant and Raymond Julio Gonzalez. There was significant debris in the road, and both cars were damaged and had to be towed from the scene. Defendant seemed puzzled and told Goodwin that he really did not know what happened. Defendant said he was driving along, saw headlights behind him, and suddenly there was a crash. Gonzalez said he did not know what happened, what street he was on, or what he was doing.

Officer Goodwin testified that defendant smelled of an alcoholic beverage, his speech was slow and fairly deliberate, and his eyes were watery and red. Defendant failed field sobriety tests. Defendant's breathalyzer test indicated that he had a blood-alcohol level of 0.15 or 0.16 percent. Goodwin believed defendant's tests indicated he was "obviously a frequent drinker" with a higher degree of alcohol tolerance.

On March 24, 1992, defendant pleaded no contest to one count of driving under the influence in violation of Vehicle Code section 23152.

April 1992 DUI conviction

On April 26, 1992, defendant was again cited for driving under the influence. The offense was charged as a felony based on the allegations that he had three prior DUIs on September 8, 1985, August 10, 1988, and March 24, 1992.

On June 4, 1992, defendant pleaded no contest to a felony DUI in violation of Vehicle Code section 23152, subdivision (a) and admitted the prior offenses.

On July 23, 1993, defendant was placed on five years of formal felony probation, with 300 days in county jail.

2009 domestic violence incident

The prosecution introduced evidence that on March 23, 2009, Officer Wolfgang of the Sunnyvale Police Department was dispatched to defendant's home to investigate a domestic violence report. Wolfgang smelled alcohol on defendant's breath and he appeared to be intoxicated. Defendant said he had too much time on his hands and drank too much whiskey. Defendant said when his girlfriend arrived home, they argued, and he put both his hands around her neck and choked her for about two seconds. Defendant was arrested for felony domestic violence and taken into custody.

2010 DUI conviction and advisement

On October 4, 2010, defendant was again cited for a DUI. On November 4, 2010, he failed to appear for the arraignment and a bench warrant was issued.

On November 15, 2010, defendant appeared in court. He waived his right to counsel and pleaded guilty to violating Vehicle Code section 23152, subdivision (b), driving with a blood-alcohol level of .08 percent or higher, based on provisional proof that his blood-alcohol level was 0.17 to 0.18 percent at the time he was driving. He was sentenced to five years informal conditional probation with service of five days, stayed on condition that he attend a residential treatment program.

At the time of his plea for the 2010 DUI offense, defendant signed a change-of-plea form that stated:

> "I understand that being under the influence of alcohol or drugs or both impairs my ability to safely operate a motor vehicle, therefore it is extremely dangerous to human life to drive under the influence of alcohol or drugs or both. *If I continue to drive under, while under the influence of*

> *alcohol or drugs or both and as a result of my driving someone is killed, I can be charged with murder*." (Italics added.)

At the 2010 plea proceedings, defendant orally acknowledged that he had read and understood the DUI advisement and waiver of rights form, and he initialed and signed it. The court orally advised defendant:

> "Okay, um, you understand that driving under the influence is incredibly dangerous and if someone is killed as a result of, uh, your driving you could be charged with murder?"

Defendant replied, "Yes, I recall."[3]

DEFENSE EVIDENCE

At the trial in this case, defendant testified that he lived with his wife and her parents in Kerman. On May 5, 2013, he went to a store and purchased food and a six-pack of beer. He had two beers while his wife and mother-in-law were out of the house. Defendant later argued with his wife. He had more beer but could not recall whether he finished the six-pack. Defendant vaguely remembered grabbing a bottle of hard alcohol; it was probably whiskey. He could not remember how much whiskey he drank. Defendant took a nap and woke up after 7:00 p.m.; he might have resumed drinking. He was angry and decided to leave the house.

Defendant testified he got into his truck and did not feel the effects of the alcohol. He did not believe he was stumbling or that he was a danger to others. He drove around and was trying to find a motel where he could stay. Defendant stopped at a motel in Fresno but thought it was too expensive, so he resumed driving. He ended up on northbound Friant Road but denied he was going to Table Mountain Casino. Defendant could not remember the collision.

Defendant testified he was in pain when he spoke to the police after the accident and did not know what he said.

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[3] The prosecution introduced an audio recording of the court proceedings for defendant's plea on November 15, 2010, and it was played for the jury.

Defendant testified he attended a DUI school in the 1990s but could not recall anything that was discussed, such as drunk driving being dangerous to human life. He had another DUI conviction in 2010 and his license was suspended. He did not have a valid license at the time of the collision in this case because he failed to attend DUI school. He did not remember being warned by the court that he could be charged with murder if he killed someone while driving under the influence.

Rose Moreno, defendant's wife, testified they argued on the day of the collision. Defendant took a nap and later left in his truck without telling her. She did not see him drink any alcohol that day, and there was no alcohol in the house.

Ms. Moreno testified they had a domestic violence incident in 2009 and defendant had been drinking that day. Ms. Moreno knew defendant had a prior DUI conviction in 2010. Defendant still drank after that time but "nothing happened."

PROCEDURAL HISTORY

The charges

On March 13, 2014, an information was filed that charged defendant with count 1, murder of Ms. Vang (Pen. Code, § 187);[4] count 2, gross vehicular manslaughter while intoxicated of Ms. Vang, with two prior DUI-related convictions in1992 (§ 191.5, subd. (a)); count 3, driving under the influence (DUI) causing injury to Mr. Her (Veh. Code, § 23153, subd. (a)); and count 4, misdemeanor driving with a suspended license for a prior DUI conviction (Veh. Code, § 14601.2, subd. (a)).

As to count 3, it was alleged that defendant had a blood-alcohol content of 0.15 percent or higher (Veh. Code, § 23578); he personally inflicted great bodily injury on Mr. Her (§ 12022.7, subd. (a)); and he had a prior DUI conviction in 2010 (Veh. Code, § 23152, subd. (b)) that occurred within 10 years of the charged offenses (Veh. Code, § 23560).

[4] All further statutory references are to the Penal Code unless otherwise indicated.

On August 26, 2016, a first amended information was filed that again charged defendant with count 1, murder of Ms. Vang (§ 187). However, the amended information omitted the gross vehicular manslaughter charge. Instead, it alleged defendant committed count 2, driving under the influence (DUI) causing injury to Mr. Her (Veh. Code, § 23153, subd. (a)); and count 3, felony driving with a blood-alcohol level of 0.08% or more causing injury to Mr. Her (Veh. Code, § 23153, subd. (b)).

As to counts 2 and 3, it was again alleged that defendant had a blood-alcohol content of 0.15 percent or higher; he personally inflicted great bodily injury on Mr. Her; and he had a prior DUI conviction in 2010 that occurred within 10 years of the charged offenses.

The first day of trial

On August 31, 2016, defendant's trial began with motions and jury selection. The court arraigned defendant on the amended information, and he pleaded not guilty and denied the allegations.

The court stated that the People had previously made an offer for defendant to enter a plea to second degree murder, with the dismissal of all other counts and enhancements alleged in the original information. Defendant rejected the offer. The court further noted the amended information had eliminated the gross vehicular manslaughter count.

Defense counsel stated he informed defendant about the amended information and the elimination of the gross vehicular manslaughter charge, and defendant "wishes to proceed forward with trial."

The court asked defense counsel if he had explained to defendant that the People were prosecuting him for second degree murder, and that "voluntary manslaughter or the gross vehicular manslaughter are not necessarily lesser included offenses and he may not have the opportunity to either argue that or have that presented to the jury as an

alternative theory." Defense counsel said he explained that to defendant and gave him a letter "to that effect as well."

The court asked defendant if he understood what defense counsel had told him, and if he still wanted to proceed to trial. Defendant said yes.

Motions in limine

The court turned to the motions in limine. The People's motion stated that defendant was charged with second degree murder based on implied malice; involuntary manslaughter was not a lesser included offense of murder based on a vehicular homicide, pursuant to the express language of section 192, subdivision (b); and that the court could not instruct on involuntary manslaughter if such an instruction was requested by the defense.

The court asked defense counsel if he had any argument. Counsel said he would still request an involuntary manslaughter instruction "regardless. I think it should be a lesser to murder and so I'll submit it."

The court granted the People's motion and said it would not instruct on involuntary manslaughter as a lesser included offense of murder based on existing legal authorities. The court advised defendant he could renew his request at the close of evidence for instructions on gross vehicular manslaughter or "some type of manslaughter" as a "viable alternative theory" to murder.

Opening statements and the court's admonishment

In his opening statement, defense counsel advised the jury that defendant accepted responsibility for Ms. Vang's death. However, counsel argued "the problem and the battle ground here is conscious disregard of life." Counsel asserted that defendant was "responsible for vehicular manslaughter, negligent homicide, whatever you want to call it, but he is not guilty of murder."

After opening statements, the court discussed defense counsel's comments outside the jury's presence. The court stated that since defense counsel said "this may be some

charge other than second degree murder," the court was going to advise the jury that at the conclusion of the case they would receive instructions on the law on all charges "and any lesser included offense that may be part of this case," and that statements of the attorneys were not evidence.

Prior to the presentation of evidence, the court advised the jury that it would instruct about the charged offenses and special allegations at the end of the trial; the instructions would fully define the elements; and the attorneys' opening statements and closing arguments were not evidence.

Instructional conference

After the parties rested, the court conducted the instructional conference in chambers and placed several matters on the record.

The court stated that as a matter of law, there were no lesser included offenses for count 1, second degree murder.

Defense counsel renewed his motion for the court to instruct on involuntary manslaughter as a lesser included offense of second degree murder and argued the jury could find from the evidence that defendant "was criminally negligent." Defense counsel said he was aware of the court's prior rulings, and he would not discuss vehicular, voluntary, or involuntary manslaughter in closing argument.

The court again denied defendant's motion and found that voluntary, involuntary, and gross vehicular manslaughter were not lesser included offenses of second degree murder based on statutory and decisional law.

Second degree murder instruction

Thereafter, the court instructed the jury with CALCRIM No. 520, second degree murder, as the only offense for count 1.

> "The defendant is charged in Count 1 with second degree murder in violation of Penal Code Section 187(a). To prove that the defendant is guilty of this crime the People must prove that, one, the defendant

committed an act that caused the death of another person; and two, when the defendant acted he had a state of mind called malice aforethought.

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"A person acts with express malice if she or he unlawfully intended to kill, however in this case the People's only theory is that the defendant acted with implied malice.

"The defendant acted with implied malice if, one, he intentionally committed an act; two, the natural and probable consequence of the act were dangerous to human life; three, at the time he acted he knew his act was dangerous to human life; and four, he deliberately acted with conscious disregard for human life.

"Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require the deliberations or passage of any period of time.

"An act causes death if the death is the direct, probable and natural consequence of the act and the death would not have happened without the act.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor, however it does not need to be the only factor that causes the death. If you find the defendant guilty of murder it is murder of the second degree."

Closing arguments

In closing arguments, the parties addressed whether there was evidence of implied malice.

Defense counsel acknowledged that the jury only had the murder charge for count 1 and the People had "put all their prosecutorial eggs in a basket for murder, but

argued the prosecution failed to prove malice. Counsel asserted that veering off the road into the dirt would have just been a misdemeanor DUI, and while defendant had "done wrong … [y]ou can't just find him guilty of murder because you can't find him guilty of something else. It's either guilty or not guilty of Count 1." Defense counsel argued that to prove conscious disregard for implied malice, "you have to be able to point to a spot and say this is where [defendant] consciously disregarded life. You have to say here's the evidence that shows what's in his mind at this particular time that he thought … I'm going to hurt somebody and then pushed it aside and kept going."

In rebuttal, the prosecutor stated that defense counsel's claim about a "moment in time" to prove conscious disregard was not in the instructions and was not the law. Defendant had been warned that drinking and driving was dangerous when he entered his plea in 2010 and attended the DUI safety classes. "You don't need that moment in time."

Convictions and sentence

On September 14, 2016, defendant was convicted as charged and the jury found the special allegations true.

On October 13, 2016, the court sentenced defendant to 15 years to life for count 1, second degree murder of Ms. Vang; the consecutive upper term of three years for count 2, driving under the influence causing injury to Mr. Her, plus three years for the great bodily injury enhancement; and stayed the term imposed for count 3, felony driving with a blood-alcohol level of 0.08% or more causing injury to Mr. Her.

APPELLATE CONTENTIONS

Defendant contends the court erred when it refused to instruct the jury on "gross negligence involuntary manslaughter" as a lesser included offense of second degree murder. Defendant argues the instruction should have been given because there was conflicting evidence of implied malice and gross negligence.

In making this argument, defendant acknowledges that a person who commits a vehicular homicide while intoxicated can be charged and convicted of second degree

murder based on implied malice, pursuant to *Watson*, *supra*, 30 Cal.3d 290. Defendant further concedes that section 192, subdivision (b) expressly states that involuntary manslaughter "shall not apply to acts committed in the driving of a vehicle."

Nevertheless, defendant raises several arguments as to why these restrictions are erroneous and violate his due process right to a fair trial and to present a defense.

In order to address defendant's contentions, we will review murder, manslaughter, and the instructional limitations in cases where a defendant has committed a vehicular homicide. As we will explain, the court properly denied defendant's motion to instruct on either gross vehicular manslaughter or involuntary manslaughter as lesser included offenses in this case.

DISCUSSION

I. Lesser Included and Related Offenses

We begin with the well-recognized principles of lesser included and related offenses, and when the court is required to so instruct.

" 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 866.)

"To determine if an offense is lesser and necessarily included in another offense for this purpose, we apply either the elements test or the accusatory pleading test. 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 404.)

The accusatory pleading test does not apply if the pleading simply states the offense in the language of the statutory definition and does not allege facts specific to the case. (*People v. Shockley, supra,* 58 Cal.4th at p. 404; *People v. Eagle* (2016) 246 Cal.App.4th 275, 279.)

In contrast, the court is under no obligation to instruct the jury on lesser related offenses, i.e., offenses that are not necessarily included in the stated charge "but merely bear some conceptual and evidentiary 'relationship' thereto." (*People v. Birks* (1998) 19 Cal.4th 108, 112, 136; *People v. Kraft* (2000) 23 Cal.4th 978, 1064–1065.) There is no constitutional right to a jury instruction on a lesser related offense. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343–1344; *People v. Rundle* (2008) 43 Cal.4th 76, 148, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.)
" '... California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties. [Citations.]' " (*People v. Hall* (2011) 200 Cal.App.4th 778, 781.)

On appeal, we independently review whether the court improperly failed to instruct on a lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

II. Murder and Manslaughter

Defendant declares that manslaughter is a lesser included offense of murder. While this is generally correct, there are important exceptions when the charged offense is based on vehicular homicide.

A. Murder and Malice

"Murder is the unlawful killing of a human being … with malice aforethought." (§ 187, subd. (a).) A murder committed with premeditation and deliberation is first degree murder; all other kinds of murder are of the second degree. (§ 189.)

"Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder. [Citations.]"

(*People v. Knoller* (2007) 41 Cal.4th 139, 151; *People v. Elmore* (2014) 59 Cal.4th 121, 133.)

In a prosecution for second degree murder, malice may be express or implied. (*People v. Swain* (1996) 12 Cal.4th 593, 601.) Express malice exists "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.)

"Malice is implied … when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

B. <u>Manslaughter</u>

Manslaughter is the unlawful killing of a human being without malice "and is divided into three classes: voluntary, involuntary, and vehicular. (§ 192.)" (*People v. Parras* (2007) 152 Cal.App.4th 219, 223.)

Section 192 defines manslaughter and states:

> "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
>
> "(a) Voluntary – upon a sudden quarrel or heat of passion.
>
> "(b) Involuntary – in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. *This subdivision shall not apply to acts committed in the driving of a vehicle.*
>
> "(c) Vehicular–
>
> "(1) *Except as provided in subdivision (a) of Section 191.5*, driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

> "(2) Driving a vehicle in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.
>
> "(3) Driving a vehicle in connection with a violation of paragraph (3) of subdivision (a) of Section 550, where the vehicular collision or vehicular accident was knowingly caused for financial gain and proximately resulted in the death of any person. *This paragraph does not prevent prosecution of a defendant for the crime of murder*." (Italics added.)

Voluntary and involuntary manslaughter are "[g]enerally" considered lesser included offenses of murder. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145 (*Gutierrez*); *People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Lewis* (2001) 25 Cal.4th 610, 645.) "If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant's constitutional right to have the jury determine every material issue. [Citation.]" (*People v. Cook*, *supra*, 39 Cal.4th at p. 596.)

As we will explain, while manslaughter is generally defined as a lesser included offense of murder, there are statutory and decisional limitations that prohibit certain instructions in vehicular homicide cases.

III. Vehicular Homicide and Murder

Defendant was charged with the second degree murder of Ms. Vang, and the prosecution relied on an implied malice theory based on *Watson*, *supra*, 30 Cal.3d 290.

"It is well established that driving while intoxicated is an act which may support a conviction for second degree murder under an implied malice theory. [Citations.]" (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1080 (*Ferguson*).) "Malice may be implied when a person willfully drives under the influence of alcohol. [Citation.]" (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 681.)

In *Watson*, the court held that in appropriate circumstances, a homicide caused by a drunk driver may be prosecuted as second degree murder based on implied malice when "the facts demonstrate a subjective awareness of the risk created, ..." (*Watson, supra*, 30 Cal.3d at p. 298.)

> " 'One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.' " (*Id.* at pp. 300–301, quoting *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897.)

The defendant in *Watson* had consumed enough alcohol to become legally intoxicated. "He had driven his car to the establishment where he had been drinking, and he must have known that he would have to it drive later." (*Watson, supra*, 30 Cal.3d at p. 300.) *Watson* presumed the defendant "was aware of the hazards of driving while intoxicated." (*Ibid.*) *Watson* went on to cite the defendant's conduct in driving through city streets at excessive speeds, his near collision with another vehicle after running a red light, and his belated attempt to brake before the fatal crash as "suggesting an actual awareness of the great risk of harm which he had created." (*Id.* at p. 301.)

Watson concluded that in second degree murder cases based on implied malice, the prosecution must prove the defendant was subjectively aware of the risk of death created by driving while intoxicated. (*Watson, supra*, 30 Cal.3d at pp. 296–297.) "Implied malice is determined by examining the defendant's subjective mental state to see if he or she actually appreciated the risk of his actions. [Citations.] Malice may be found even if the act results in a death that is accidental. [Citation.] It is unnecessary that implied malice be proven by an admission or other direct evidence of the defendant's mental state; like all other elements of a crime, implied malice may be proven by circumstantial evidence. [Citation.]" (*People v. Superior Court* (*Costa*) (2010) 183

Cal.App.4th 690, 697.) "It is not enough that a reasonable person would have been aware of the risk. [Citation.]" (*People v. Moore* (2010) 187 Cal.App.4th 937, 941.)

"[C]ourts have identified factors relevant for upholding a murder conviction based on drunk driving: '(1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving.' [Citation.]" (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1114, disapproved on other grounds in *People v. Hicks* (2017) 4 Cal.5th 203, 214, fn. 3; *People v. Autry* (1995) 37 Cal.App.4th 351, 358.)

For example, a defendant's prior drunk driving convictions, or attendance at educational programs highlighting the hazards of driving while intoxicated, have been held to establish implied malice to support a second degree murder conviction, based on the defendant's subjective understanding and conscious disregarding of the risk to human life created by driving while intoxicated. (See, e.g., *People v. Marlin* (2004) 124 Cal.App.4th 559, 572 [defendant's eight prior convictions for driving under the influence of alcohol provided sufficient basis for no contest plea to implied malice murder charge]; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532 [defendant's prior convictions for driving under the influence and attendance at driver's education program as required by sentences on those convictions admissible to show implied malice].)

The fact that a defendant chose to drive, despite being warned by others that he or she was too intoxicated to drive, has also been found to support a reasonable inference that the defendant was subjectively aware of the risk posed by driving while intoxicated. (See, e.g., *People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1092 [affirming murder conviction where the defendant refused offers for a safe ride home, was warned at a bar that she was too drunk to drive and could harm people, and had, on prior occasions, been warned that she was too drunk to drive and might injure someone]; *Ferguson, supra,* 194 Cal.App.4th at pp. 1077–1079 [affirming implied malice murder conviction where defendant, a Marine, drove while intoxicated despite repeated warnings from friends that

he was too intoxicated to drive, and despite routine warnings from the Marine Corps at liberty briefings regarding the dangers of drinking and driving].)

While the amended information charged defendant with murder using generic language, it was clear from the People's pretrial motions and the trial evidence that the murder charge was based on defendant's conduct in driving while intoxicated and killing Ms. Vang. The evidence of implied malice was further based on the admonishment defendant received during his prior DUI conviction 2010, that he could be charged with murder if he killed someone while driving drunk, and the warnings he ostensibly received at the prior DUI course he had attended.

IV. Vehicular Homicide and Gross Vehicular Manslaughter

Given this background, defendant asserts the court should have instructed on "grossly negligent" involuntary manslaughter as a lesser included offense of second degree murder. Defendant further argues that such an instruction was permitted pursuant to the California Supreme Court's ruling in *People v. Sanchez* (2001) 24 Cal.4th 983 (*Sanchez*), disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228–1229.)

A. Gross Vehicular Manslaughter

As set forth above, section 192, subdivision (c) defines the offense of vehicular manslaughter to include gross vehicular manslaughter.

> "Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being *without malice aforethought*, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." (§ 191.5, subd. (a), italics added.)

The elements to prove gross vehicular manslaughter while intoxicated are "(1) driving a vehicle while intoxicated; (2) when so driving, committing some unlawful

act, such as a Vehicle Code offense with gross negligence, or committing with gross negligence an ordinarily lawful act which might produce death; and (3) as a proximate result of the unlawful act or the negligent act, another person was killed. [Citation.] Gross negligence is the exercise of so slight a degree of care as to exhibit a conscious indifference or 'I don't care' attitude concerning the ultimate consequences of one's conduct. [Citation.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159, disapproved on other grounds in *People v. Cook* (2015) 60 Cal.4th 922.) The defendant's state of mind is reviewed under an objective standard: "[W]hether a reasonable person in the defendant's position would have been aware of the risk involved. [Citation.]" (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036.)

B. Sanchez

In *Sanchez, supra,* 24 Cal.4th 983, the defendant was driving with a blood-alcohol level of 0.17 percent, lost control of his truck, crossed into the opposing lane, and crashed into another vehicle, seriously injuring the driver and killing the passenger. At the time, he had two prior DUI convictions and one charge pending against him, and his license was suspended. The defendant was convicted of murder under an implied malice theory pursuant to *Watson*, and gross vehicular manslaughter while intoxicated. (*Id.* at pp. 986–987.)

Sanchez held that the defendant was properly convicted of both offenses. In doing so, the California Supreme Court acknowledged "the general tradition" that involuntary manslaughter was considered a lesser included offense of murder but held gross vehicular manslaughter while intoxicated was not a lesser included offense of murder. (*Sanchez, supra,* 24 Cal.4th at pp. 988–989.)

> "When we compare the elements of murder with the elements of gross vehicular manslaughter while intoxicated, it appears ... that the statutory elements of murder do not include all the elements of the lesser offense. Gross vehicular manslaughter while intoxicated requires proof of elements that need not be proved when the charge is murder, namely, use of

a vehicle and intoxication. Specifically, section 191.5 requires proof that the homicide was committed 'in the driving of a vehicle' and that the driving was in violation of specified Vehicle Code provisions prohibiting driving while intoxicated." (*Id.* at p. 989.)

Sanchez further explained:

"Defendant points to the long-established tradition in this state holding that manslaughter is a lesser included offense of murder. (See, e.g., *People v. Pearne* (1897) 118 Cal. 154, 157 …]; *People v. Muhlner* (1896) 115 Cal. 303, 305 …; *People v. Gilmore* (1854) 4 Cal. 376, 380; see also *People v. McFarlane* (1903) 138 Cal. 481, 484 …; *People v. Tugwell* (1917) 32 Cal.App. 520, 528 …; *People v. Shimonaka* (1911) 16 Cal.App. 117, 121 ….) We agree that the tradition identified by defendant is well established in this state, and that many recent decisions, including numerous decisions of this court, have held that manslaughter is a lesser included offense of murder. 'California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice.' (*People v. Rios* (2000) 23 Cal.4th 450, 460 ….) We also have stated: 'It has long been the law that a "charge of murder includes by implication a charge of the lesser degree of murder as well as voluntary and involuntary manslaughter." [Citations.]' (*People v. Thomas* (1987) 43 Cal.3d 818, 824 …; see *People v. Breverman* [(1998)] 19 Cal.4th [142,] 154; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 517 …; *In re McCartney* (1966) 64 Cal.2d 830, 831 …; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 173, p. 529.)" (*Sanchez, supra*, 24 Cal.4th at pp. 989–990.)

"Although it long has been held that manslaughter is a lesser included offense of murder, this tradition has not explicitly included offenses requiring proof of specific elements unique to vehicular manslaughter. Unlike manslaughter generally, vehicular manslaughter while intoxicated requires proof of elements that are not necessary to a murder conviction. The use of a vehicle while intoxicated is not merely a 'circumstance,' but an element of proof when the charge is gross vehicular manslaughter while intoxicated. Gross vehicular manslaughter while intoxicated is not merely a degree of murder, nor is it a crime with a lengthy pedigree as a lesser included offense within the crime of murder." (*Id.* at p. 991.)

Sanchez further explained the exception to the rule of lesser included offenses:

> "Although it generally is true that manslaughter is a lesser included offense of murder, because generally manslaughter simply involves an unlawful killing of a human being without malice, gross vehicular manslaughter while intoxicated – like assault with a deadly weapon – requires proof of *additional elements* that are not included in the offense of murder or in other forms of nonvehicular manslaughter.... Although we recognize that historically manslaughter in general has been considered a necessarily included offense within murder, that long and settled tradition has not extended to the more recently enacted forms of vehicular manslaughter that require proof of additional elements." (*Sanchez*, *supra*, 24 Cal.4th at p. 992, original italics, fn. omitted.)

Sanchez thus held that gross vehicular manslaughter while intoxicated is a lesser *related* offense and not a lesser *included* offense of murder. (*Sanchez*, *supra*, 24 Cal.4th at pp. 991–992; *Ferguson*, *supra*, 194 Cal.App.4th at p. 1082, fn. 3; *People v. Batchelor*, *supra*, 229 Cal.App.4th at p. 1116.)

C. Sanchez and Section 192, Subdivision (b)

Defendant argues he was legally entitled to an instruction on involuntary manslaughter because it has always been viewed as a lesser included offense of murder under both the elements and accusatory pleading tests. Defendant asserts the instruction should have been given in this case since the amended information used generic language to describe the murder charge and did not specifically allege vehicular homicide or driving while intoxicated.

Defendant was charged in this case with murder, and the amended information alleged the statutory elements of the offense without specific allegations about vehicular homicide. During the pretrial motions, however, it was clear that the People were relying on *Watson* to try defendant for second degree murder based on vehicular homicide and implied malice.

As explained in *Sanchez*, gross vehicular manslaughter is not a lesser included offense of murder under the statutory elements test. Instead, it is a lesser related offense, and the court was not required to instruct on the offense.

Moreover, section 192, subdivision (b) expressly states that involuntary manslaughter shall not be applied to acts committed in the driving of a vehicle and has been interpreted to mean that "although involuntary manslaughter is *usually* a lesser included offense of murder [citation], in the context of drunk driving it is not." (*Ferguson*, *supra*, 194 Cal.App.4th at p. 1082, italics added.)

A defendant has a due process right to a jury instruction on a lesser included offense only when the evidence would support a conviction on that lesser offense. (*Gutierrez*, *supra*, 28 Cal.4th at p. 1145.) In this case, the trial evidence showed, without contradiction, defendant was driving a vehicle while intoxicated. He crossed into the opposing lane, crashed into the Toyota, killed Ms. Vang and seriously injured Mr. Her. As a result, defendant could not be convicted of involuntary manslaughter based on the evidence, and section 192, subdivision (b)'s express language that an involuntary manslaughter conviction was barred in vehicular homicide cases. As a result, the court properly denied defendant's request for an instruction on involuntary manslaughter as a lesser included offense of murder.

Defendant asserts that *Sanchez* supports his instructional argument because the court in that case cited, with approval, prior rulings that found manslaughter was generally a lesser included offense of murder. (*Sanchez*, *supra*, 24 Cal.4th at pp. 989–990.) Defendant argues that "[n]othing in *Sanchez's* reasoning undercuts that case law" and does not preclude instructing on involuntary manslaughter as a lesser included offense of murder based on vehicular homicide. To the contrary, *Sanchez* noted the general rule about murder and manslaughter and prior cases that addressed the greater and lesser included offenses, but specifically distinguished vehicular manslaughter cases: "Although we recognize that historically manslaughter in general has been considered a necessarily included offense within murder, that long and settled tradition has not extended to the more recently enacted forms of vehicular manslaughter that require proof of additional elements." (*Sanchez, supra*, 24 Cal.4th at p. 992, fn. omitted.) There is

nothing in *Sanchez* that undermines the specific exclusionary language of section 192, subdivision (b).

D. Statutory History of Section 192, Subdivision (b)

Defendant also acknowledges the exclusionary language in section 192, subdivision (b) but argues the 1945 history of the legislation that added that statute was not correctly interpreted by *Watson*, cases decided after *Watson* found manslaughter was a lesser included offense to murder; and there is no legislative purpose to follow the statutory exemption when the district attorney charges a defendant with murder instead of vehicular manslaughter.

Defendant's challenges to the legislative history of section 192, subdivision (b) are meritless. "Statutory construction begins with the plain, commonsense meaning of the words in the statute, ' "because it is generally the most reliable indicator of legislative intent and purpose." ' [Citation.]" (*People v. Manzo* (2012) 53 Cal.4th 880, 885.) "The courts may not *expand* the Legislature's definition of a crime [citation], nor may they *narrow* a clear and specific definition." (*People v. Farley* (2009) 46 Cal.4th 1053, 1119, original italics.)

Section 192, subdivision (b) "makes the ordinary definition of involuntary manslaughter inapplicable to acts committed in driving a vehicle." (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 262, p. 1086.) Under the plain meaning of this statutory language, which has not been amended, involuntary manslaughter cannot be charged as a matter of law in vehicular homicide cases, and thus is precluded as a lesser included offense of murder.

Watson addressed implied malice and second degree murder in DUI cases; it did not address section 192, subdivision (b). As we have already noted, *Sanchez* cited prior cases that held manslaughter was a lesser included offense of murder, but also explained that "it generally is true that manslaughter is a lesser included offense of murder, …" (*Sanchez, supra*, 24 Cal.4th at p. 992.) *Sanchez* unequivocally concluded that gross

vehicular manslaughter while intoxicated is not a lesser included offense of murder because it "requires proof of *additional elements* that are not included in the offense of murder or in other forms of nonvehicular manslaughter." (*Ibid*.) *Watson* and *Sanchez* did not undermine the continued validity of the prohibition stated in section 192, subdivision (b).

E. Burroughs

Defendant claims the California Supreme Court undermined the prohibition contained in section 192, subdivision (b), based on language contained and cases cited in *People v. Burroughs* (1984) 35 Cal.3d 824 (*Burroughs*) (overruled on other grounds in *People v. Bryant* (2013) 56 Cal.4th 959, 967–968 and *People v. Blakeley* (2000) 23 Cal.4th 82, 89).

This argument is also without merit. *Burroughs* did not involve a vehicular homicide case or address the express prohibition stated in section 192, subdivision (b). In that case, the defendant was a "self-styled 'healer' " and convinced a gravely ill patient to undergo the defendant's alternative treatments. These treatments included " 'deep' abdominal massages" and led to "a massive hemorrhage" and the victim's death. The defendant was convicted of second degree felony murder on the theory that the killing occurred in the commission of felony practicing medicine without a license. (*Burroughs*, *supra*, 35 Cal.3d at pp. 826–828.)

Burroughs reversed the murder conviction and held that practicing medicine without a license could not support a felony-murder conviction because it was not an inherently dangerous felony. (*Burroughs*, *supra*, 35 Cal.3d at pp. 829–833.) *Burroughs* further held that the court should have instructed the jury on involuntary manslaughter. The court stated that on remand, the defendant "was susceptible to a possible conviction of involuntary manslaughter" (*id*. at p. 834, fn. omitted), and the jury should be so instructed, because a killing without malice in the commission of a noninherently

dangerous felony would constitute involuntary manslaughter if " 'committed without due caution and circumspection.' " (*Id*. at p. 835.)

In addressing the possibility of an involuntary manslaughter conviction, *Burroughs* addressed section 192:

> "Involuntary manslaughter is described in section 192 as a killing, without malice 'in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' While a killing in the course of commission of a noninherently dangerous felony does not appear to be precisely within one of these descriptions, the court in *People v. Morales* (1975) 49 Cal.App.3d 134, 144 ..., held that as a matter of statutory construction, the noninherently dangerous felony of grand theft may support a conviction of involuntary manslaughter, if the felony is committed 'without due caution and circumspection.' We agree that the only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection. Thus, if the jury had concluded the activities performed by [the defendant] in the course of the commission of the felonious unlicensed practice of medicine proximately caused the death of [the victim], and that these activities were committed 'without due caution and circumspection,' the jury could properly have convicted [the defendant] of involuntary manslaughter.
>
> "Indeed, while the descriptions listed in section 192 of the ways in which involuntary manslaughter is committed do not specifically detail circumstances identical to those involved in this case, the only rational interpretation of section 192 is that the Legislature intended felons situated as [the defendant] is here be susceptible to conviction for involuntary manslaughter. 'It would be anomalous to hold, although defendant's unlawful act proximately caused the death, that he should bear no criminal responsibility for the homicide.' (*People v. Morales*, *supra*, 49 Cal.App.3d at p. 144.) More anomalous still would be a holding that while one who kills in the course of a *lawful* act without due caution and circumspection is guilty of involuntary manslaughter, one such as [the defendant], who allegedly commits a homicide while committing a noninherently dangerous *felony*, is guilty only, perhaps, of a battery. If [the victim] died from the massages unlawfully administered by [the defendant], defendant certainly ought not *benefit* from the fact that those massages were felonious, rather

than lawful." (*Burroughs*, *supra*, 35 Cal.3d at pp. 835–836, italics in original, fns. omitted.)

Immediately after this discussion of involuntary manslaughter relative to the facts of the case, *Burroughs* turned to the language of section 192, subdivision (b):

> " '[The] basic definition set forth at the outset of Penal Code section 192 is of controlling significance – "Manslaughter is the unlawful killing of a human being, without malice." ' ([*People v. Morales*, *supra*, 49 Cal.App.3d] at p. 145.) The Legislature provided in section 192, [then] subdivision 2, that a killing in the commission of a lawful act which might produce death if committed without due caution and circumspection is involuntary manslaughter.... A fortiori, an unintentional homicide committed in the course of a noninherently dangerous felony (which might, nevertheless, produce death if committed without due caution and circumspection) ought be punishable under section 192 as well." (*Burroughs*, *supra*, 35 Cal.3d at p. 836, fn. omitted.)

The above-cited language in *Burroughs* did not disapprove or nullify the express prohibition contained in section 192, subdivision (b). Section 192 begins: "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:" Subdivision (a) defines voluntary manslaughter, and subdivision (c) defines vehicular manslaughter. Subdivision (b) defines involuntary manslaughter:

> "(b) Involuntary – in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle." (§ 192, subd. (b).)

Burroughs did not address a vehicular homicide case or the prohibition stated in the last sentence of section 192, subdivision (b). Instead, it focused on the specific facts of that case – that the defendant therein could not be guilty of murder – and the jury should be instructed on involuntary manslaughter on remand. *Burroughs* addressed the "prefatory language" of section 192 – that the basic definition of manslaughter was an "unlawful killing of a human being, without malice" – because that language was pertinent to whether the defendant in that case could be convicted of manslaughter. In

doing so, *Burroughs* did not imply that it was disapproving the rest of subdivision (b), or that the statutory exclusion could be disregarded or ignored.

F. Due Process

Defendant next asserts his constitutional rights to due process and to present a defense were violated when the court refused to instruct on involuntary manslaughter because it left the jury with "an all or nothing choice to either find implied malice in order to hold the defendant accountable, or acquit the defendant for an unlawful homicide for which he was obviously responsible."

Defendant's "all or nothing" argument is similar to the California Supreme Court's explanation that a trial court has a sua sponte duty to instruct on lesser included offenses in appropriate circumstances. (*People v. Hicks*, *supra*, 4 Cal.5th at p. 210.) As discussed above, however, a defendant is only entitled to such instructions if there is evidence substantial enough for a jury to convict the defendant of the lesser included offense. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) "Due process requires that the jury be instructed on a lesser included offense *only* when the evidence warrants such an instruction. [Citations.]" (*Gutierrez*, *supra*, 28 Cal.4th at p. 1145.) "It has never been the law that an accused is entitled to instructions on offenses for which he is not charged in order to urge the jury that he could have been convicted of something other than what is alleged." (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.)

In this case, the court did not have a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense of murder because defendant was tried for murder based upon a vehicular homicide, and section 192, subdivision (b) prevented him from being charged with or convicted of involuntary manslaughter. He, therefore, had no right to have the jury instructed on involuntary manslaughter. In addition, if the jury determined the prosecution failed to prove implied malice, as argued by defense counsel, the result would not have been an acquittal on the sole charge of murder.

*G. **Prejudice***

Defendant argues the court's failure to instruct on involuntary manslaughter amounted to federal constitutional error subject to review under *Chapman v. California* (1967) 386 U.S. 18, and the error was not harmless beyond a reasonable doubt.

In a noncapital case, however, a court's error in failing to sua sponte instruct on a lesser included offense is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. The defendant must show it is reasonably probable a more favorable result would have been obtained absent the error. (*People v. Breverman, supra*, 19 Cal.4th at p. 165; *People v. Beltran* (2013) 56 Cal.4th 935, 955.)

"At least since 1981, when our Supreme Court [in *Watson, supra*, 30 Cal.3d 290] affirmed a conviction of second degree murder arising out of a high speed, head-on automobile collision by a drunken driver that left two dead, California has followed the rule in vehicular homicide cases that 'when the conduct in question can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied ....' [Citation.]" (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 109–110.)

It is not reasonably probable that a result more favorable to the defendant would have occurred if the jury had been instructed on involuntary manslaughter. In his pretrial statements to Officer Yetter, defendant admitted he had prior DUI convictions, he attended an 18-month DUI course in the 1990s, and he knew drinking and driving were dangerous. Defendant admitted he was driving without a license, and there were several other occasions when he was drinking and driving but had not been caught.

At trial, defendant claimed not to remember anything that was discussed at the DUI course or that he was told drunk driving was dangerous to human life. However, it is undisputed that as part of his 2010 DUI conviction, defendant was expressly admonished in his plea form, and by the court during the plea proceedings, that he could be charged with murder if he killed someone while driving under the influence.

Defendant also admitted in his pretrial statements that he had consumed beer and alcohol before he left his home in Kerman, claimed that he was "coherent" when he was driving, but added that "of course I'm buzzed." Defendant said it was a "stupid decision" to drink and drive that night.

Defendant's blood was tested two hours after the collision, and his blood-alcohol level was 0.36 percent, over four times the legal limit of 0.08 percent.

The witnesses described defendant's truck as crossing over the center line into the opposing lane and crashing into the victims' vehicle. While the evidence from his truck indicated he slowed down, he did so just seconds before the collision and none of the witnesses saw the truck try to correct back into the northbound lane.

Even if the trial court should have instructed the jury on involuntary manslaughter, it is not reasonably probable the jury would have found that defendant did not appreciate the risk involved in his actions or act in wanton disregard for human life. (*People v. Ortiz*, *supra*, 109 Cal.App.4th at pp. 109–110.)

DISPOSITION

The court properly declined to instruct the jury on any form of involuntary manslaughter as a lesser included offense of second degree murder based on vehicular homicide.

The judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

_____
PEÑA, J.